



(58)

Office - Supreme Court, U. S.

~~FILED~~

JUN 10 1944

CHARLES ELMORE DROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the
State of Missouri,

Petitioner,

vs.

AMERICAN BRIDGE COMPANY, a Cor-
poration,

Respondent.

No. 1045.

107

On Petition for a Writ of Certiorari to the Supreme Court
of the State of Missouri.

**BRIEF FOR AMERICAN BRIDGE COMPANY
IN OPPOSITION.**

WALTER R. MAYNE,
NELSON W. HARTMAN,
506 Olive Street,
St. Louis, Missouri,

Attorneys for American Bridge
Company, Respondent.

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
506 Olive Street,
St. Louis, Missouri,
Of Counsel.



INDEX.

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	5
A state public officer has no right to question the validity of a state revenue statute before the United States Supreme Court.....	6
Where a local revenue state law is involved, the United States Supreme Court is not interested in review for there is no federal question.....	7
Conclusion	13
Appendix:	
Section 11409, Missouri Sales Tax Act, Laws of 1941, pages 702 and 703.....	15
Opinion of Attorney-General.....	16

Cases Cited.

Buchalter v. People of the State of New York, 63 Sup. Ct. 1129, 87 Law. Ed.....	9
Carmichael v. Southern Coal and Coke Co., 301 U. S. 495, 81 Law. Ed. 1245.....	10
Chemical National Bank v. City Bank, 160 U. S. 646, 16 Sup. Ct. 417, 40 Law. Ed. 568.....	8
Columbus and Greenville Railroad Co. v. W. J. Miller, State Tax Collector, 283 U. S. 96, 75 Law. Ed. 861..	6
Commercial Bank v. Buckingham, 5 Howard 317, 12 Law. Ed. 169.....	9
Connor v. Metropolitan District Water Supply Co., 49 N. E. (2d) 593.....	9
Grand Gulf R. R. Co. v. Newhall, 12 Howard 165, 13 Law. Ed. 938.....	9

Hunter Co., Inc., v. Joseph L. McHugh, Commissioner of Conservation of the State of Louisiana, 64 Sup. Ct. 19, 88 Law. Ed., page 16.....	11
Illinois Central R. R. v. State of Minnesota, 60 Sup. Ct. 419, 309 U. S. 157, 84 Law. Ed. 670.....	7
Lasseur v. Price, 12 Howard 1259, 13 Law. Ed. 893, ...	9
Leo Feist, Inc., v. Young, 46 Fed. Supp. 622.....	10
Magnano v. Hamilton Co., 292 U. S. 40, 78 Law. Ed. 1109	11
Magonen v. Illinois Trust & Savings Bank, 170 U. S. 283, 42 Law. Ed. 1037.....	10
McDonald v. Oregon Navigation Company, 233 U. S. 665, 34 Sup. Ct. 772, 58 Law. Ed. 1145.....	8
McLeod v. J. E. Dilworth Company, 88 Law. Ed. 910, decided by this Court on May 15, 1944.....	12
New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 58, 43 Law. Ed. 323.....	8
New York Rapid Transit Corp. v. State of New York, 303 U. S. 573, 82 Law. Ed. 1024.....	10
Phillips Petroleum Co. v. Green, 119 Fed. (2d) 466, 62 Sup. Ct. 72, 86 Law. Ed. 511.....	11
Sacramento Municipal District v. Pacific Gas & Elec. Co., 128 Pac. (2d) 529.....	9
Snell v. Chicago, 152 U. S. 191, 14 Sup. Ct. 489, 38 Law. Ed. 408	9
State ex inf. McKittrick ex rel. Ham v. Kirby, 349 Mo. 988, 163 S. W. (2d) 990.....	9
Thompson v. Consolidated Gas Utilities Corp., 57 Sup. Ct. 364, 300 U. S. 55, 81 Law. Ed. 510.....	7, 8
Welch v. Henry, 305 U. S. 134, 83 Law. Ed. 87.....	10

Statutes Cited.

Mason's Minnesota's Statutes 1927, paragraphs 2246, 2247	7
Sec. 11409, R. S. Mo. 1939, as amended, Laws of 1941, pages 698 to 714.....	2, 3, 4, 15

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the State of Missouri,	Petitioner,	} No. 1045.
vs.		
AMERICAN BRIDGE COMPANY, a Cor- poration,	Respondent.	

On Petition for a Writ of Certiorari to the Supreme Court
of the State of Missouri.

**BRIEF FOR AMERICAN BRIDGE COMPANY
IN OPPOSITION.**

OPINION BELOW.

The opinion of the Court below is reported at 179 S. W.
(2d) 12 (Mo.).

JURISDICTION.

It is the contention of the American Bridge Company, Respondent, that the Supreme Court of the United States has no jurisdiction in this matter based on Petitioner's own statement of question presented. In Petitioner's Petition for Writ of Certiorari, under the caption, "Statement of Question Presented," we quote the following in its entirety:

“The sole question presented in this case is whether or not Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, as construed by Missouri Supreme Court, creates an unreasonable classification of retail sales and therefore violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the United States.”

We contend that by such statement and by other admissions made by Petitioner in his Summary Statement of the matter involved, he admits that the state law above referred to, is valid, and the only question is whether it has been correctly construed, which question concerning the construction of a State revenue statute gives the Supreme Court of the United States no jurisdiction. The Supreme Court of the State of Missouri has construed the section of the Missouri laws in question, after having had before it a complete record which included all of the facts adduced by the parties at an extended trial in the lower court.

QUESTIONS PRESENTED.

I.

There were two questions at issue before the Missouri Supreme Court: one, whether the sales which were made by American Bridge Company to customers and users within the State of Missouri were **sales made in the State of Missouri**; two, whether certain types of sales made by American Bridge Company to customers for use and consumption in the State of Missouri were such sales as to be specifically exempted under Section 11409, R. S. Mo. 1939, as amended, Laws of 1941, pages 698 to 714.

There are two questions presented to this Court in considering the petition for writ of certiorari; one, whether or not a public officer has the authority to question the constitutional validity of a state revenue statute in the United

States Supreme Court, and, two, whether or not there can be any Federal question involved where a state revenue statute has been held valid and reasonable by the Missouri Supreme Court.

STATUTE INVOLVED.

The pertinent provisions of the Missouri Sales Tax Act are set forth in the Appendix, *infra*, page 15.

STATEMENT.

The proceedings in the present case originated in the Circuit Court of Cole County, Missouri, where the petition was filed by the American Bridge Company against the Petitioner herein under the Missouri Declaratory Judgment Act, alleging that the sales made by the American Bridge Company from outside of the State of Missouri to customers and users within the State were not taxable for two reasons: one, that a certain type of sales made by American Bridge Company were not sales within the State of Missouri and hence the State had no authority to tax same, and the Missouri Supreme Court in its opinion so found; secondly, that the other types of sales made by American Bridge Company to customers and users within the State of Missouri, all of said sales being made by shipment of products from outside of the State of Missouri into the State, were transactions in interstate commerce and were specifically exempt under Section 11409 of the Missouri Retail Sales Tax Act, and the Supreme Court of the State of Missouri in its opinion held that such sales were not taxable.

The facts show that the American Bridge Company is a foreign corporation licensed to do business in the State of Missouri, maintains a sales office in St. Louis, Missouri, but that no stock of its products is maintained in the State of Missouri. The products are consigned to pur-

chasers in some instances f. o. b. cars at the American Bridge Company's plants in other states, and in other instances f. o. b. point of destination in Missouri.

The sales involved necessitate transportation of goods from other states to users and consumers in the State of Missouri and counsel for Petitioner admitted that all of the transactions were interstate sales.

The Missouri Supreme Court in interpreting a Missouri revenue statute, held that the Sales Tax Act does not aim at or discriminate against **interstate** commerce and imposes the same burden upon the sales in controversy as is imposed upon sales in **intrastate** commerce, but that the Missouri legislature specifically exempted the type of sale involved in this case by Section 11409, R. S. of Missouri 1939, as amended, Laws of 1941, pages 698 to 714, and held that the exemption is reasonable and that such exemption was valid and would not place sellers in intrastate commerce in a position of competitive disadvantage.

Further, the Missouri Supreme Court in its opinion reviewed the Missouri Sales Tax Act from its inception and determined therefrom the correct construction of the statute based on legislative intent. The action in the state courts was the result of the State Auditor's office endeavoring by rules and regulations to enlarge the Missouri Sales Tax Act to such a degree so as to make it a **use** tax, and the Missouri Supreme Court in its opinion held that such was not proper.

ARGUMENT.

The petition for certiorari is largely devoted to the subject of endeavoring to raise a Federal question which became an afterthought theory of the Petitioner after the opinion of the Missouri Supreme Court had been rendered. In his endeavor to inject such theory in the case, the Petitioner dwelt on this subject matter by filing three different motions with the Missouri Supreme Court: one, a motion for rehearing; two, a motion for modification; three, a motion to transfer the case to the court en banc, and in all three of these motions the Petitioner endeavored to insert an issue which is not in this case. The Missouri Supreme Court denied all of Petitioner's three motions heretofore referred to.

In its statement of facts, Petitioner omits most of the important evidentiary findings upon which the Supreme Court based its ultimate determination that the sales of the type which the American Bridge Company made to users and consumers in the State of Missouri could not be taxed under the Missouri Sales Tax Act. The Number One statement in Petitioner's Petition for Certiorari is not correct for the reason that the decision of the Supreme Court of Missouri involved the construction and meaning of a revenue statute of the State. The Missouri Supreme Court has the right and final word on the interpretation of its own revenue statutes, and the decision below is proper in holding, first, that certain types of sales made by American Bridge Company were not sales made in this State (the State of Missouri) and, second, that the Legislature of Missouri intended that the exemption clause should exempt all sales at retail in the sales transactions of interstate commerce. The Supreme Court of Missouri in its decision is correct, for it presents no Federal question, no conflict of decisions, no violation of the equal pro-

tection clause of the Fourteenth Amendment to the Federal Constitution of the United States, and further presents no question of general importance. The petition for writ of certiorari should therefore be denied.

The Petitioner in the present case is Forrest Smith, State Auditor of the State of Missouri, and the petition is filed before this court for the reason that he is not satisfied with a decision of the Missouri Supreme Court involving the interpretation of a revenue statute in the State of Missouri.

**A State Public Officer Has No Right to Question the
Validity of a State Revenue Statute Before
the United States Supreme Court.**

It has been held by this Court that the authority of a public officer to assail in the courts of the State the constitutional validity of a state statute is a local question not reviewable by the United States Supreme Court. The constitutional protection of the Fourteenth Amendment against state action does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied equal protection of the laws.

The United States Supreme Court, in the case of *Columbus and Greenville Railroad Co. v. W. J. Miller, State Tax Collector*, 283 U. S. 96, 75 Law Ed. 861, held the following:

“We are not concerned with any question of the state’s policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the Act of 1926 is raised only by the state tax collector in his official capacity, as one acting solely under authority of the legislature whose requirement he contests. The only person taxed by the statute whose rights are before the court is the petitioner which seeks to uphold the state legisla-

tion which defines its liability and with which it has complied. * * * While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the Federal question by this Court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through discriminations which the Amendment forbids. The constitutional guarantee does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied equal protection of the laws." Citing *Smith v. Indiana*, 191 U. S. 138, 148, 48 Law. Ed. 125; *Huntington v. Worthem*, 120 U. S. 97, 101, 30 Law. Ed. 588; *Stewart v. Kansas City*, 239 U. S. 14, 16, 60 Law. Ed. 120, 121.

**Where a Local Revenue State Law Is Involved, the
United States Supreme Court Is Not Interested
in Review for There Is No Federal Question.**

In construing Mason's Minnesota Statutes 1927, paragraphs 2246, 2247, imposing tax on railroads based on gross earnings arising out of debits and credits for exchange of freight cars with other railroads, computed according to the Burlington formula, it was held that the Supreme Court of the United States would defer to the State court's interpretation that credits taxed were gross earnings within the meaning of the statute. *Illinois Central R. R. v. State of Minnesota*, 60 Sup. Ct. 419, 309 U. S. 157, 84 Law. Ed. 670.

Furthermore, it has been held that the United States Supreme Court will not decide an issue of the constitutionality of a state statute if the case may justly and reasonably be decided upon the construction of the statute under which the Act is clearly constitutional. *Thompson*

v. Consolidated Gas Utilities Corp., 57 Sup. Ct. 364, 300 U. S. 55, 81 Law. Ed. 510.

It was held in the case of *Chemical National Bank v. City Bank*, 160 U. S. 646, 16 Sup. Ct. 417, 40 Law. Ed. 568, that where the state appellate court reviewed the judgment of the trial court for errors committed in the trial, and, finding none, affirmed it, and the Supreme Court of the State affirmed the judgment of the appellate court, and the claim of mandate of the laws of the United States was not set up in the trial court, the judgment is not subject to review in the Supreme Court of the United States.

In the case of *New York v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 Law. Ed. 323, it was held that the action of the State Comptroller in determining, for the purpose of taxation, the amount of the capital stock of a foreign corporation employed within the state, confirmed by the Supreme Court of the State, does not present a federal question.

It has been held by this court that, "It is elemental and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure but gives jurisdiction to this court to review mere errors of law alleged to have been committed by the state court in the performance of its duties within the scope of its authority concerning matters not federal in character." *McDonald v. Oregon Navigation Company*, 233 U. S. 665, 34 Sup. Ct. 772, 58 Law. Ed. 1145.

It is basic law and has been ruled on many times by this Court, that where the state law is admitted to be valid and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction. Further, that the decision of the state court resting upon the construction and not upon the validity of the statute of the State, does not present a fed-

eral question. *Commercial Bank v. Buckingham*, 5 Howard 317, 12 Law. Ed. 169, and *Lasseur v. Price*, 12 Howard 1259, 13 Law. Ed. 893; *Grand Gulf R. R. Co. v. Newhall*, 12 Howard 165, 13 Law. Ed. 938; *Snell v. Chicago*, 152 U. S. 191, 14 Sup. Ct. 489, 38 Law. Ed. 408.

On the question of equal protection of law, it has been held by the Supreme Court of the United States that the Fourteenth Amendment does not draw to itself the provisions of state statutes or state laws but leaves the states free to enforce their laws under such statutory provisions and common law doctrines as they deem appropriate and it does not permit the party to bring a test of the decision in the United States Supreme Court over ruling made in the course of a trial in the state court. *Buchalter v. People of the State of New York*, 63 Sup. Ct. 1129, 87 Law. Ed.

In a 1943 State of Massachusetts case, *Connor v. Metropolitan District Water Supply Co.*, 49 N. E. (2d) 593, it was held that a statutory discrimination will not be set aside as a denial of equal protection of the laws if any set of facts reasonably may be conceived to justify it.

In the case of *Sacramento Municipal District v. Pacific Gas & Elec. Co.*, 128 Pac. (2d) 529, it was held that a wide discretion is vested in the legislature in making a statutory conclusion and every presumption is in favor of the validity of the statute and a decision of the legislature construing what is sufficient distinction to warrant conclusion will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous.

In the most recent case in the State of Missouri, *State ex inf. McKittrick ex rel. Ham v. Kirby*, 349 Mo. 988, 163 S. W. (2d) 990, it was held that the equal protection of law clause of the Fourteenth Amendment to the Constitution of the United States does not require an exactly equal treatment of all citizens but the legislature may, under it, create certain classes and make laws applicable to some but not all of such classes, provided the principle

of classification rests upon some real difference, bearing a reasonable and just relation to the act with respect to which classification is proposed.

In the case of *Leo Feist, Inc., v. Young*, 46 Fed. Supp. 622, it was determined that in the exercise of the power to tax, it is inherent that the state be free to select the subjects of taxation and to grant exemptions. It was further held in that case that even though there are inequalities of classification in the tax statute, they do not result in a denial of equal protection of the law if they result merely from the singling out of one particular class for taxation. Further, in determining whether the statute results in a denial of equal protection of the law, the court must presume that legislative distinctions have been made on a rational basis, if there is any conceivable set of facts which would support it. It was further held in this case that it is inherent in the exercise of the power to tax that the state be free to select the subjects of taxation and to grant exemptions. Citing *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, 81 Law. Ed. 1245.

Any classification of taxation is permissible which has a reasonable relationship to a legitimate end of governmental action. Taxation is but the means by which government distributes the burden of its costs among those who enjoy its benefits. *Welch v. Henry*, 305 U. S. 134, 83 Law. Ed. 87.

Even though classification results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *New York Rapid Transit Corp. v. State of New York*, 303 U. S. 573, 82 Law. Ed. 1024.

The rule of equality permits many practical inequalities. What constitutes this equality has not been, and probably never can be, precisely defined. *Magouen v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 Law. Ed. 1037.

The mere fact that the rate of a tax may discourage or even prevent the operation of a business within the field of the taxing authority, will not justify the court in striking down the taxing act. *Magnano v. Hamilton Co.*, 292 U. S. 40, 78 Law. Ed. 1109.

In the very recent case of *Hunter Co., Inc., v. Joseph L. McHugh*, Commissioner of Conservation of the State of Louisiana, 64 Sup. Ct. 19, 88 Law. Ed., page 16, it was held that the Supreme Court of the United States is not free to and will not adjudicate the constitutionality of orders of the Commissioner of Conservation of Louisiana, under act Louisiana No. 157 of 1940, empowering him to establish oil drilling permits, and it was further held that an action challenging the validity of this act and an order thereunder relating to the establishment of such units did not properly present a federal question.

In the present case, the American Bridge Company has secured a ruling from the Supreme Court of Missouri. The matter at issue was brought to a head with reasonable promptness and the state court has interpreted and construed its own statutes and the United States Supreme Court will not upset a state court's interpretation of one of its own revenue statutes.

There is no intention of the United States Supreme Court to interfere with internal tax problems of the sovereign states. In the case of *Phillips Petroleum Co. v. Green*, 119 Fed. (2d) 466, 62 Sup. Ct. 72, 86 Law. Ed. 511, the Eighth Circuit Court of Appeals was called upon to determine whether the general store tax applied against Phillips, since the company contended its bulk plants were not stores, and the Eighth Circuit was called upon to determine what was a store and it found that the Iowa courts had not passed upon what was a store and the opinion of the Eighth Circuit remanded the question to the trial court "with directions to retain the bill pending a determination of proceedings being brought with reason-

able promptness in the state court in conformity with this opinion," and the court for the Eighth Circuit further said that the sole question before it was one of Iowa law as to which neither the Supreme Court of Iowa, nor any other court in the state, had ruled and that there was no need of asking the Eighth Circuit for a decision upon a debatable question of Iowa law, and that the Federal court might by deciding the issue be making a tentative answer which could be displaced tomorrow by a state adjudication.

In the recent case of *McLeod v. J. E. Dilworth Company*, 88 Law. Ed. 910, decided by this Court on May 15, 1944, Justice Frankfurter stated, "Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and have different opportunities afforded by the state." In the conclusion of his opinion Justice Frankfurter states, "Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the **area of free trade** among the states."

This opinion further states that the absence of a use tax indicates a desire to have an area of free trade and this opinion applied to Missouri law shows that the Missouri Legislature time and time again sought to create an area of free trade and did from time to time protect that area, and the Missouri Supreme Court in its opinion further protected such free trade area by an affirmance of the right to exclude from taxation those taxable transactions that would require a use tax. The State of Missouri created and protected an area of free trade and such is purely a local question.

In the present case, the Missouri Supreme Court has correctly decided the matter on what the legislature intended not to tax, and the question of what they have a right to tax is not in litigation, nor is that a matter for the court to pass on. The Legislature of the State of Missouri has elected not to tax the subject in controversy and

therefore there can be no constitutional question involved because the State has unlimited powers and it has not exercised all of its powers and if it fails to exercise all of its taxing powers then it could not have violated the Constitution.

The Attorney General of the State of Missouri on February 8, 1941, rendered an opinion in connection with the Missouri Sales Tax Act, which opinion is in conformity with the decision of the Supreme Court of Missouri in the present case. Appendix page 16.

CONCLUSION.

We desire to call the Court's attention to the fact that practically all the authorities cited by the State Auditor in support of his petition for writ of certiorari are from dissenting opinions of this Court or from opinions which have been overruled. In view of this we felt that the most learned and considered decision of the Missouri Supreme Court below is correct and presents no conflict of decisions nor violations of the Fourteenth Amendment, since the State Auditor is not a proper party petitioner and there is no Federal question involved.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

WALTER R. MAYNE,
NELSON W. HARTMAN,
Attorneys for American Bridge Company,
Respondent.

FORDYCE, WHITE, MAYNE,
WILLIAMS & HARTMAN,
Of Counsel.